MALAYAN UNION REPORT.

CHONG KON LIP v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Spenser Wilkinson, Ag. J.,) September 2, 1946]

Minor Offences Enactment, Section 35 (i) — Possession of property reasonably suspected of being stolen or fraudulently obtained — Accused must be actually found in possession or found actually conveying — Whether conviction under Section 35 (i) of the Minor Offences Enactment can be altered to one under Section 35 (iii) where accused is not actually found in possession.

In this case a Sergeant Major of Police, on information received went to the premises of a Bus Company in Kajang and there found four motor lorry tyres, two nearly new and two retreaded. The director of the bus company later informed the Sergeant Major that he had purchased the tyres from the accused. The accused was then charged for being in possession of the tyres, being property reasonably suspected of being stolen. At the trial before the Magistrate the accused gave evidence on his own behalf and stated that he had sold these tyres to the Bus Company for $500/-, that he had driven a lorry belonging to his brother during the Japanese occupation and that when the Japanese insisted on purchasing the lorry he managed to replace the good lorry tyres with old worn-out tyres, and that is how he came to be in possession of these four tyres which were, admittedly, practically unused. The accused appealed against his conviction under Section 35 (i) of the Minor Offences Enactment.

Held, (1) that under Sub-Section (i) of Section 35 of the Minor Offences Enactment the basis of the right of the Police to call for an explanation of the accused's possession is that accused is actually found in possession or found actually conveying and that as in this case the accused was not found in possession of the tyres, the Sub-Section was wrongly invoked and the conviction under the Sub-Section was wrong;

(2) that it was not possible to alter the conviction to one under Sub-Section (iii) of Section 35 as (a) had the accused been tried for an offence against Sub-Section (iii) his statements made to the Police would have been inadmissible in evidence and (b) the offences under the two sub-sections are so different in character that it by no means follows that the Court which is satisfied under the one will necessarily be satisfied on the same evidence under the other, nor is it certain that the defence put forward by the accused would have been the same.

Cases referred to:—

(1) *Tan Hoe Seng v. P. P.* (1936) F.M.S.L.R. 135; (1936) 5 M.L.J. 272.

(2) *Munusamy v. Public Prosecutor* (1936) F.M.S.L.R. 194; (1937) 6 M.L.J. 93.

(3) *Banta Singh v. Public Prosecutor* (1940) F.M.S.L.R. 199; (1941) 10 M.L.J. 154.

(5) *Gurunathan Chettiar v. P. P.* (1938) F.M.S.L.R. 213; (1939) 8 M.L.J. 229.

(6) *Flatman v. Light* (1946) 1 K.B. 416.

(7) *Fong Sai Mun v. Public Prosecutor* (1931-2) F.M.S.L.R. 42.

H. Y. Teh for the appellant.

Grattan-Bellew, D. P. P. for the respondent.

Spenser-Wilkinson, J. :—The facts in this case are as follows. A sergeant Major of Police, on information received, went to the premises of a Bus Company in Kajang on the 4th June and there found four motor lorry tyres, two nearly new and two retreaded. The director of the Bus Company was then in Singapore, but when he returned a few days later, he must have informed the Sergeant Major that he had purchased these tyres from the accused about ten days earlier. On this information the Sergeant Major on the 11th June went with the director to the house of the accused. As a result of information then given by the accused, he went to two firms in Kuala Lumpur to enquire whether any of the tyres in question had been retreaded there. As a result of the answers given by these two firms, the Sergeant Major arrested the accused for being in possession of these tyres, being property reasonably suspected of being stolen. At the hearing before the Magistrate, in addition to the evidence given by the Sergeant Major as to the enquiries he had made, evidence was also given by the O.C.P.D. who stated that, in view of the fact that accused could not satisfactorily account for ownership of the tyres, he was charged.

The accused gave evidence on his own behalf and stated that he had sold these tyres to the Bus Company for $500 that he had driven a lorry belonging to his brother during the Japanese occupation and that when the Japanese insisted on purchasing the lorry he managed to replace the good lorry tyres with old wornout tyres, and that is how he came to be in possession of these four tyres which were, admittedly, practically unused.

Several points were taken on behalf of the appellant on the evidence. The most substantial of these concerned paragraph 2 of the Grounds of Decision of the Magistrate. He gave as one of his reasons for disbelieving the accused that, although he removed the tyres in 1944, he did not sell them till May 1946 in spite of the very high current prices ruling for tyres during this period; and he sets out figures indicating prices in the years 1944, 1945 and 1946. It is objected on behalf of the appellant that there was no evidence whatsoever before the Magistrate

as to the prices of tyres of this or any other make during the relevant period. I think, however, that in setting out what he believed to have been the current prices of tyres during the period in question the Magistrate intended to do no more than to set out in detail the notorious fact that tyres have for a considerable time been extremely difficult to obtain in this country and fetch such high prices that thefts of tyres have become more and more prevalent. I must agree with the Deputy Public Prosecutor that this ground of decision was, to say the least, unfortunately expressed but the view which I take as to the law relating to this case makes it unnecessary for me to decide whether this indicated a misdirection of himself by the Magistrate sufficient to justify interference by this Court.

The accused was brought before the Court under sub-section (i) of Section 35 of the Minor Offences Enactment. That sub-section reads as follows :—

> Any person who has in his possession or conveys in any manner anything which may be reasonably suspected of being stolen or fraudulently obtained shall, if he fails to account satisfactorily how he came by the same, be liable to a fine of fifty dollars, or to imprisonment for three months.

The accused was not *found* in possession of these tyres, having sold them some ten days before he was questioned, and the question therefore arises whether the words "has in his possession" can cover a case of this kind where the accused does not have the goods in his possession at the time when he is called on by the Police for an explanation. I think the words "who has in his possession or conveys" must be read with the words "shall, if he fails to account satisfactorily how he came by the same" and that therefore the having in possession and the failing to account must be contemporaneous. I reach this conclusion not only from reading the section as a whole but also from those cases in which the section has been discussed in the Courts.

With regard to the actual wording of the section in question, it is to be observed that sub-sections (ii) and (iii) deal specifically with persons who have had possession in the past and a procedure is laid down for dealing with such cases. The use of the past tense in sub-sections (ii) and (iii) seems therefore to preclude reading sub-section (i) as referring to anything but the present.

I am confirmed in this view by a series of decisions which indicate that before sub-section (i) can apply at all, the accused must have actual possession of the goods in question. In *Tan Hoe Seng v. P. P.*[1] Aitken, J. went into the meaning and history of this sub-section at some length. In the course of his judgment he says :—

> The Court must be satisfied that the evidence shows that the Police Officer entertained a reasonable suspicion that the rubber in question had been stolen or fraudulently obtained at the time when he questioned the appellant.

In that case, the time when the Police Officer questioned the appellant was the time when he found him in possession of the goods. Later, in the same judgment, there is a quotation from a decision of the Supreme Court of the Gold Coast upon a somewhat similar section of the Gold Coast Criminal Code. In that judgment, which Aitken, J. adopted as his own, the following passages occur :—

> In my opinion the moment of such reasonable suspicion is the moment when the person is found in possession of the article by the person who subsequently prefers the charge against him.
>
> The mere fact that it is stated in the charge that it was reasonably suspected that the half-sovereign had been stolen or unlawfully obtained would not be sufficient to justify the Court in calling for an explanation from the accused, unless the Court was satisfied from the evidence before it that the constable arresting and charging the accused actually had such reasonable suspicion at the time when he found the accused in the possession of the half-soverign.

In *Munusamy v. Public Prosecutor*[2] Terrell, Acting C.J. said :—

> It is for the Court to be satisfied that the circumstances were such that the police officer had grounds for suspicion that the property in the accused's possession was stolen property and that such suspicion was reasonable.

Again in *Banta Singh v. Public Prosecutor*[3] Howes, J. said :—

> Under Section 35 (i) of the Minor Offences Enactment, once a person is found in possession of anything reasonably suspected of being stolen, the onus is on him to account satisfactorily how he came by the same.

Other cases in which the sub-section has been interpreted as meaning that the accused must be found in possession are *The King v. Chan Ah Soo*[4] and *Gurunathan Chettiar v. P. P.*[5] and *in Flatman v. Light*[6], Goddard, L.C.J. discussing the effect of section 24 of the Metropolitan Police Court Act, 1839, which is somewhat similar to our sub-section says: "A man found in very suspicious circumstances in possession of property. He can be called upon to give an account of how he got it."

I am therefore of the opinion that under sub-section (i) of section 35 of the Minor Offences

Enactment the basis of the right of the Police to call for an explanation of the accused's possession is that accused is actually found in possession or found actually conveying. In this case accused was not found in possession of these tyres, the sub-section was therefore wrongly invoked and the conviction under that sub-section was wrong.

It was, however, urged upon me by the Deputy Public Prosecutor that as the accused was in fact before the Court (even if brought there illegally) he could have been dealt with under sub-sections (ii) and (iii) of the same section, and I was therefore invited to alter the conviction to one under sub-section (iii) of section 35.

There are two reasons why I do not think this course is possible. In the first place, had the accused been tried for an offence against sub-section (iii) I do not think that any of his statements made to the Police would have been admissible in evidence. It was held in *Tan Hoe Seng's* case (cited above) that the explanation given by a person called upon by the police under sub-section (i) must be admissible in the subsequent proceedings under that sub-section. But the same considerations do not apply to proceedings under sub-sections (ii) and (iii) where no question of any explanation to the police arises. In my view, on the authority of *Fong Sai Mun v. Public Prosecutor*[7] the statements were made in the course of a police investigation and were not admissible in respect of a charge under sub-section (iii) of section 35.

It was argued that the evidence thus given by the the Police witnesses in this case was necessarily so similar to the evidence which the accused himself gave in Court or would have given had he been charged under sub-section (iii) that he cannot have been prejudiced. But the first ground in the Magistrate's Grounds of Decision is that the accused did not give a true or satisfactory explanation when first interviewed by the Police, and that ground would not have been relevant to a charge under sub-section (iii). It cannot be said that the evidence as to what the accused said to the Police did not affect the Magistrate's decision.

The second reason why I do not think it possible to alter the conviction to one under the third sub-section is that the offences under the two sub-sections are so different in character that it by no means follows that the Court which is satisfied under the one will necessarily be satisfied on the same evidence under the other, nor is it certain that the defence put forward by the accused would have been the same. Under sub-section (i) a person is liable "if he fails to account satisfactorily how he came by" the goods in question; under sub-section (iii) he will be liable only "if it appears to the Magistrate" that "he had reasonable cause to believe the same to have been stolen or fraudulently obtained." Under sub-section (i) the burden is placed clearly and unambiguously on the accused to explain his possession but I have some doubt as to whether the wording of sub-sections (ii) and (iii) which in an Enactment of this kind must be construed strictly, is apt to place the burden on the accused to disprove reasonable cause to believe. However this may be, I am not prepared to say whether, if the inadmissible evidence had been excluded, it would or should, on the remaining evidence have appeared to the Magistrate that the accused had reasonable cause to believe the tyres in question to have been stolen or fraudulently obtained.

In my opinion, these proceedings were misconceived from the start. The Police might perhaps, if they had considered that the circumstances justified such a course, have brought some officer or member of the Bus Company before the Court under sub-section (i) and might then have invited the Magistrate to exercise his powers under sub-section (ii) against the present accused. If however, the Police had been satisfied with the account given by the Bus Company, then in my view that would have been the end of any proceedings under section 35 of the Minor Offences Enactment. I do not think sub-sections (ii) and (iii) can be invoked at all until there is some person properly before the Court under sub-section (i) and as there is now nobody before the Court under the first sub-section, I do not consider it possible to send the case back for re-hearing under sub-section (iii). I can therefore see no alternative open to me but to allow the appeal and set aside the conviction and sentence. The tyres will be returned to Foh Hup Bus Company.

Appeal allowed.